

Summary of the Cheyenne River Sioux Tribe June 19, 2017, Letters to EPA

In letters dated June 19, 2017, signed by Chairman Harold Frazier, the Cheyenne River Sioux Tribe provided comments on the EPA UIC permits and proposed aquifer exemption and requested government-to-government consultation with the EPA on the proposed actions at the Dewey-Burdock site.

The letters contain the following assertions:

1. The Dewey-Burdock (DB) Uranium In-Situ recovery (ISR) site poses a serious threat to tribal rights that the EPA must thoroughly evaluate.

- a. The DB ISR site (Site) poses a serious threat to the Tribe's Treaty Rights and Reserved Water Rights
 - The Cheyenne River forms the southern border of our reservation and flows into the Missouri River after it flows through the Black Hills and near the Site.
 - In 2005, when a drought threatened the Tribe's only source of drinking water, which is drawn from an intake at the confluence of the Cheyenne River and the Missouri River at Lake Oahe, the US Army Corps of Engineers determined that the loss of this water source (decrease in water quantity and degraded water quality) would devastate the Tribe.
 - The Tribe retains reserved water rights in off-reservation waterways and other bodies of water in the Missouri River Basin (including the Cheyenne River) as well as groundwater and aquifers outside its Reservation.
 - Impacts to off-reservation tributaries and aquifers belonging to the Lake Oahe hydrologic system and will impact the Tribe's retained hunting and fishing rights in Lake Oahe.
- b. The Site poses a serious threat to the Tribe's Cultural Resources
 - There are numerous sites of historic, spiritual and cultural significance to the Tribe throughout the Tribe's large aboriginal territory, but especially within the boundaries of the large reserved of the tribe in the Fort Laramie Treaty of 1851. The permit area occurs within the Tribe's aboriginal territory.
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 - There are sites of historic and cultural interest to the Tribe that have not been identified, for which impacts have not been assessed and mitigation measures have not been developed.
- c. The Site poses a serious threat to the Tribe's Religious exercise.
 - Under RFRA the government shall not substantially burden a person exercise of religion.
 - Tribal religious practices are significantly tied to oral tradition, ancestral lands and natural resources.
 - The Tribe's reserved water rights constitute a spiritual and cultural resources as the primary role of water in Lakota religious sacraments, which require environmentally and ritually pure water.
- d. In accordance with the federal trust responsibility, the EPA must consult on the Tribe's rights and has a duty to protect them.
- e. Consultation under the NHPA concerning cultural and spiritual resources is not sufficient to meet obligations to consult about reserved water rights, treaty rights, or other religious freedom issues.
- f. Reviewing a Tribe's comments submitted in conjunction with an agency's general invitation for public comments is not sufficient to meet this obligation.

2. The EPA must engage in meaningful government-to-government consultation with the Tribe encompassing the following components:

- a. Provide the Tribe with and explain all pertinent information concerning the impact on the Tribe's rights in a timely manner before consultation.
- b. Coordinate with the Tribe before consultation begins, especially with development of an agreement on consultation timelines.

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- c. Consult only with tribal representatives who have been authorized to engage in government-to-government consultation by the Tribal government.
 - d. Make every effort to conduct Tribal consultation at the seat of Tribal government, Eagle Butte, South Dakota or elsewhere on the Cheyenne River Sioux Reservation.
 - e. Ensure that federal participant in Tribal consultation have actual decision-making authority.
 - f. Provide written confirmation that the agency has considered tribal comments and concerns in the agency's response, whether positive or negative.
 - g. Obtain resolution of approval from the Tribe that the agency has satisfactorily consulted with the Tribe and the Tribe agrees with the agency's response to Tribal concerns in each instance.
- 3. The federal government has further obligations under the National Historic Preservation Act and the Religious Freedom Restoration Act.**
- a. An agency must ensure the process provides Tribes with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties...articulate its view on the undertaking's effects on such properties, and participate in the resolution of adverse effects."
 - b. This requirement imposes on agencies a "reasonable and good faith effort by agencies to consult with Tribes in a manner respectful of tribal sovereignty."
- 4. The letters reference a Memorandum of Agreement (MOA) on *Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites* dated Sept 23, 2016.**
- a. The letters indicate the EPA was a participant and state "The Memorandum acknowledges that federal agencies hold in trust many culturally important sites held sacred by Indian Tribes and federal agencies are responsible for analyzing the potential effects of agency project carried out, funded, or permitted on historic properties of traditional cultural and religious importance to Indian tribes, includes sacred sites." However, further research revealed that this reference confused the following documents:
 - i. On September 23, 2016, the Department of the Interior, Department of Justice, and the Department of the Army issued a joint letter to Tribal Leaders committing to a broad review and consultation with Tribes on how Federal decision making on infrastructure and related projects can better allow for timely and meaningful Tribal input. A January 2017 Report entitled, *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*, is the product of this government-to-government consultation and comments received from fifty-nine Tribes (and eight organizations representing Tribal interests) in October and November 2016 (from ACHP website). The consultation letter included the January 2017 report as an enclosure.
 - ii. There is a November 2012 MOA with Departments of Defense, Interior, Agriculture, Energy and the Advisory Council of Historic Preservation (ACHP) *Interagency Coordination and Collaboration for the Protection of Indian Sacred Sites* (from the US Forest Service website).
 - iii. There is a September 2016 MOA with the Departments of Interior, Agriculture, Justice, Commerce, Defense, Transportation and White House Council on Environmental Quality, the EPA and the ACHP, *Interagency Coordination and Collaboration for the Protection of Tribal Treaty Rights* (from the EPA website).
 - b. Although the EPA was not a signatory to September 23, 2016, letter or the November 2012 MOA, the EPA's Tribal Consultation Policy advocates the concepts of both documents.